

X. Undue Burden Determinations Require a Balancing of the Costs of Providing Captions with the Financial Resources and Type of Operation of the Covered Entity.

Section 713 allows video providers and owners to petition the FCC for individual exemptions from the captioning requirements, if they can show that providing captions would impose an undue burden. The FCC has rejected NAD's suggestion that it adopt rules patterned after the ADA's undue burden standard, based on language in Section 713's legislative history that directs the Commission to focus on the individual outlet, rather than the outlet's corporate parent, when considering a provider's resources for an exemption. ¶96, n. 186, citing House Report at 114-115. The FCC acknowledges, however, that Section 713's definition of "undue burden" was patterned after the use of this term in the ADA, and asks whether there are other portions of the ADA's analysis that may provide useful insight in defining this captioning exemption. ¶96, n.187. We submit that even if a corporate parent's resources are not considered in the undue burden determination, there are other components of the ADA's analysis that apply here.

Like the ADA, the undue burden test in Section 713(d)(3) directs the Commission to balance the nature and cost of providing captions with the overall financial resources and type of operation of the provider or owner, and narrowly permits an exemption only upon a showing that the provision of captions would result in a "significant difficulty or expense." As we noted in our reply comments to the NOI, NAD Reply Comments at 27-28, the Department of Justice has applied the undue burden standard to permit ADA exemptions only where the entity covered (e.g. a college or university) can prove that accommodating a disability would so adversely affect the finances or administration of that entity's operations as to be unduly burdensome. This is

consistent with the legislative intent behind Section 713(d)(3), which directs the Commission to “balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.” H. Rep. at 235.

Size of the market, degree of program distribution, and audience ratings or share are not permissible factors for consideration under the undue burden subsection of Section 713. As we noted in our reply comments to the NOI, NAD Reply Comments at 26-30, whether or not a college or university only has only a few, or many, individuals with disabilities is irrelevant to whether the entity must provide auxiliary aids such as sign language interpreters under the ADA’s undue burden standard. Rather, auxiliary aids must be provided unless the school can prove undue administrative or fiscal burden.

Similarly, the ADA does not balance the cost of providing an accommodation with the budget for a particular service in determining undue burden exemptions. In our reply comments, we gave as an example physicians who, under the ADA, are required to pay for sign language interpreters for office visits even when the cost of those interpreters exceeds the charges for those office visits. Rather, the undue burden standard looks at the physician’s overall resources, and compares *that* with the cost of the auxiliary aid, rather than comparing the cost of the office visit with the auxiliary aid.

When applied in the captioning context, the above analysis requires captioning for a program when the overall revenues of a provider, producer, or owner are sufficient to handle captioning costs, even when the particular production budget of or revenues derived from that particular program may not be substantial, and even when the audience watching such program may be small.

Thus, in the example given in our NOI Replies, a national broadcaster's claim that it should not be required to caption a single regionalized sporting event because the advertising revenues and viewership attributable to that event are small, will not be sufficient to warrant a captioning exemption, so long as the resources of the broadcaster can withstand the costs of captioning that regionalized event.

The FCC has also sought comment on conditioning the undue burden exemption with a requirement for greater use of textual graphics for certain types of programming. ¶97. We urge that such a conditional exemption be granted *only* in situations where a provider or owner would otherwise be qualified to receive an exemption, i.e. where it has proven significant difficulty or expense.

The Commission proposes to use waiver type procedures for undue burden exemptions, wherein petitions for exemptions would allow for public notice and comment and would be supported by factual information supplied in affidavits. ¶99. We fully support such an individualized process that would, as the Commission notes, allow it to fashion specific remedies and partial or temporary waivers as the need may arise. Moreover, unlike the economically burdensome exemption found in Section 713(d)(1), Congress made clear that undue burden exemptions permitted by Section 713(d)(3) are to be granted on a case-by-case basis, rather than as part of rulemakings which would be widely applicable for broad classes of programming.¹⁰

¹⁰ The Conference Report for Section 713(c)(3) states that this section "authorizes the Commission to grant additional exemptions, on a case-by-case basis, where providing closed captions would constitute an undue burden." Conf. Rep. at 183.

The FCC next seeks comment on whether only providers or owners should be permitted to seek an exemption, or whether program producers and syndicators also should be permitted to do so. ¶101. As holds true for any legal mandate, only those entities which are covered by the rules' mandates should be permitted to seek relief from those mandates. Thus, if in the final analysis, only video programming providers are held responsible for the compliance obligations, only they should be permitted to seek exemptions from those obligations. Insofar as decisions as to who will bear the costs of captioning are likely to be determined through contractual arrangements between providers and producers, providers would be permitted to seek undue burden exemptions only where neither they nor producers supplying the programming are able to bear those costs.

Finally, we urge that undue burden exemptions be granted for a limited period of time, namely, one year. Not only may the financial circumstances of a petitioner change over time, but the costs and technologies of captioning are rapidly changing, making necessary a periodic evaluation of the need for an undue burden exemption.

XI. Minimum Standards of Captioning Quality are Necessary to Preserve Congressional Intent.

We applaud the FCC's decision to require all video program providers, regardless of their distribution technology, to "be responsible for the transmission of the captioning" and to "take whatever steps are necessary to monitor their equipment and signal transmission to ensure that captioning is included with the video programming that reaches consumers." ¶110. As we noted in our comments to the NOI, NAD Comments at 21-23, often captioned programs arrive scrambled or stripped by the time they reach their final cable or local network destinations as a result of engineering errors in placing caption data on the wrong line or field, or a failure to

readjust settings after commercial breaks and the use of digital video effects.¹¹ Monitoring captions as they pass from a program's site of origination to local affiliates, cable providers, or other final destinations to ensure that they are being passed through intact will significantly reduce, if not eliminate, these errors in caption transmissions.

The Commission expresses a concern about adopting standards for the non-technical aspects of captioning quality, such as accuracy of transcription, punctuation, placement, identification of nonverbal sounds, pop-on or roll-up style, verbatim or edited for reading speed, and type font. ¶111. The FCC explains that it is hesitant to prescribe such detailed standards because of concerns about the availability of captioning services, the costs of captioning, and the difficulty of developing and administering such standards. ¶112. The Commission has suggested instead that it can revisit the need to mandate certain levels of caption quality if, after a period of adjustment to the new captioning environment, it becomes apparent that quality levels are unsatisfactory. ¶118.

We understand the Commission's concerns with respect to very specific captioning standards, such as punctuation, type font, and caption speed, and propose that the Commission monitor and revisit the details of these very precise captioning issues two years after its captioning rules go into effect.¹² We maintain, however, that even without such specific standards, the Commission can nevertheless provide some very basic, but minimum standards for captioning

¹¹ For example, we noted that when the video picture is digitally mixed or "squeezed" to simultaneously air another type of programming, careless engineering sometimes results in the failure to reinstate the captions after the video effect is completed.

¹² By this time, even under the Commission's own transition schedule, twenty-five to fifty percent of all new programming would contain captions (assuming the percentage requirements apply (footnote cont'd on next page)

quality, to which new entrants to the captioning industry can turn, and on which consumers can depend, for guidance as to what is legally required under Section 713.¹³ Such standards should be designed to ensure accessibility and usability of captions for viewers, and will serve to prevent a proliferation of low quality captioning services that might otherwise result from the entrance of new companies into the captioning business.

In our initial comments to the NOI, we set forth principles for captioning quality, restated in the Commission's present NPRM at ¶106. Several of these are not difficult to develop and administer and are critical to ensuring that captioning transmits information which is functionally equivalent to information available through a program's soundtrack. Whether the Commission categorizes these as technical or nontechnical standards, we urge that the following basic requirements for captioning quality be adopted:¹⁴

- Captions must include all elements of the soundtrack necessary for accessibility, including, but not limited to, verbal information (including information on voice inflections), identification of the speaker (if it is not apparent), sound effects, background noise, type of music, and audience reaction.
- Captions must be provided in the style and standards that are appropriate for the particular type of programming that is being captioned. For live programming, this would require real-time captioning.¹⁵

over and above existing captioning percentages), and would provide ample data with which to determine whether quality standards are needed.

¹³ This is similar to what the FCC did for the provision of telecommunications relay services (TRS), when, in 1991, it promulgated minimum standards for relay quality, but declined, for example, to establish typing speeds for communications assistants. Now that relay services have been in place for some time, the FCC is revisiting its minimum standards to ensure that they meet the functional equivalency standard required by Title IV of the ADA. In the Matter of Telecommunications Relay Services, the Americans with Disabilities Act of 1990, and the Telecommunications Act of 1996, Notice of Inquiry, CC Dkt. No. 90-571 (January 14, 1997).

¹⁴ These proposed guidelines are slightly revised from our original proposals, to take into consideration new issues raised in the current NPRM.

¹⁵ This is discussed in more detail later at pp. 26-27 *infra* of these comments.

- Captions must contain spelling which accurately enables the viewer to understand the audio content of a program. Similarly, typographical errors should be kept to a minimum for full access to video programming content.¹⁶
- The placement of captions must reflect the source of audio information contained in the program's soundtrack.
- Captions on pre-recorded shows must be in synchronization with the audio content of the program. For live programming and programming which has been recorded earlier in the day, this standard should be met to the fullest extent possible.
- Captions must be reformatted as necessary when the programming on which they are included have been compressed or otherwise edited.¹⁷
- Care must be taken to ensure that captions remain intact throughout the distribution chain, from the point of origination to the local video provider.¹⁸
- Closed captioned master tapes used for duplication should be labeled as such (e.g., "cc") as these move through the distribution chain.
- Open character generated announcements, such as emergency warnings, names of speakers, weather advisories, and school closings, must not obscure or be obstructed by closed captions.¹⁹

The Commission has acknowledged that "[u]nless closed captions accurately reflect the audio portion of the video programming to which they are attached, they may be of limited use to the viewer." In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming

¹⁶ The FCC's Report on captioning acknowledged that, unlike words in a book, captions are "impermanent. When there are typographical errors or incorrect word usage, the reader does not have the time to look over the previous words to deduce the intended meaning." Report at ¶187.

¹⁷ This is discussed in more detail at pp. 7-8 *supra* of these comments.

¹⁸ This standard seems to have been accepted by the Commission as a technical standard for captioning.

¹⁹ The Commission itself has acknowledged that captions "should not interfere with the viewability of the video portion of the program." ¶111.

Accessibility, Report, MM Dkt. No. 95-176 at ¶87 (Report). Indeed, captions replete with mistakes in spelling, timing, and placement are of limited value to individuals wishing to understand a program's content. It is incumbent upon the Commission, as the agency charged with carrying out Section 713's mandates, to ensure that the proliferation of new captioning services do not set so low a threshold of captioning quality as to defeat the intent of Section 713's requirements for video access. The above minimum guidelines will go a long way toward fulfilling that intent, and toward meeting the Commission's own recognized goal of providing information "substantially equivalent to . . . the audio portion of a video program."

Out of a concern that high levels of accuracy for live captioning cannot be met at this point in time or may result in the loss of captioning services, the FCC proposes that for live programming, "adequate, but not high quality captions may need to be acceptable for at least the short term." ¶113-114. The NAD strongly maintains that it would be a mistake to set low standards for live captioning at the start of this new industry. Once the FCC's captioning rules are put into place, there will be new employment opportunities for live captioners throughout the United States. If high standards of captioning quality are in place, then the facilities that will be training stenocaptioners will ensure that their students meet those standards before being released into the field. If mere "adequacy" is the FCC's goal, then that is likely to be the standard for a long time to come. Even if the FCC does not set *specific* typing or accuracy standards at the present time, it is critical for the Commission to make clear that it has an overall expectation for a superior quality of live captioning. At the same time, the NAD would not be opposed to an interim period of approximately one to two years (after the rules go into effect) during which the FCC could be lenient with respect to the quality of live captioning, with the understanding that

higher standards would be expected at its completion. During this one to two year period, an increasing number of individuals would have time to acquire stenocaptioning skills, and captioners would be able to “adjust” to the higher expectations of the new captioning environment. This would be a vast improvement over leaving open-ended the requirement that live captioning merely be “adequate.”

XII. Real-Time Captioning of Live Newscasts is Necessary for Full Accessibility.

The FCC has acknowledged the problems with electronic newsroom captioning (ENR), but proposes to permit the use of ENR as a result of its concerns with the higher costs of requiring real-time captioning. ¶121.

The NAD maintains that use of ENR for live newscasts, as compared to real-time captioning, violates both the spirit and intent of Section 713. That section requires that new programming, including live programming, be “fully accessible” to caption viewers. As the FCC is aware, ENR cannot provide full access because it does not provide captioning of live interviews, field reports, sports and weather updates, school closings, late breaking stories which are not prescribed, and banter among anchor persons. The FCC expresses the concern that currently, there may not be a sufficient number of stenocaptioners to handle the demand for live captioning were it to become an FCC requirement. However, we strongly maintain that once a mandate for this type of captioning is issued, the court reporting field will certainly accelerate efforts to train stenocaptioners to fill these employment functions. At best, then, any rule which permits ENR should be limited in time to, at most, one or two years. After that point, the FCC should require real time captioning for all live newscasts, unless a given station can prove undue burden, as is required by Section 713.

XIII. The FCC's Enforcement Procedure Should Include a Coordination Point for Complaints and Clearinghouse Functions.

The NAD is concerned about the Commission's proposal to require (1) a complaining party to notify the video programming provider of a complaint before filing with the FCC, and (2) to allow the provider to resolve the complaint before having it undergo FCC review. ¶ 122-123. To begin with, we are unaware of any similar requirement for other federal nondiscrimination laws. Additionally, although there are advantages to seeking resolution of consumer complaints short of filing with the Commission, to date, consumers have found it difficult, if not impossible, to contact stations for the purpose of reporting captioning errors and omissions. The reasons for this are as follows:

- Unlike a product with a package insert, it is not easy to ascertain the telephone number or address for a given station. This information naturally is not provided with the program itself, and so it is left to the consumer to ascertain it on his or her own.
- It is often not clear who is the proper provider to contact. For example, where a program passes through a cable or satellite company, but originates with a broadcaster, the consumer typically does not know which is the appropriate entity to contact.
- Currently, there is no mechanism set up by video providers to receive and respond to complaints. Thus, these typically go ignored and unanswered.
- There are no known accessible means for deaf or hard of hearing viewers to contact video providers directly about captioning concerns, e.g., via TTYs, Internet, and other means.
- Where a provider responds that it is not responsible for the captioning error, consumers do not know where to turn next. The burden of conducting a further investigation into the root of captioning problems have fallen on the consumer, who does not have the expertise to conduct such an investigation.

There are other problems with the Commission's present proposal to require consumers to contact video providers, and to require a response from those providers, before it agrees to review consumer complaints. First, the NPRM contains no timeframes for providers to respond to these initial grievances. We propose that, at most, a provider be required to acknowledge

receipt of a complaint within 15 days, and to respond to its contents within 30 days. It is important to remember that TV programming is time intensive. Long delays will moot the issue for a complainant who wishes to see regularly scheduled programming with captions. Second, the Commission has not set forth guidelines as to what will constitute a good faith effort by a provider to resolve a complaint. The FCC suggests a party “be permitted to file with the Commission only after the video provider fails to respond to the complaint, or does not satisfactorily resolve the problem” ¶123. Accordingly, we urge the FCC to define what constitutes a failure to respond or a satisfactory resolution of the problem.

Most of the above problems can be resolved if the FCC establishes a consumer council or coordination point for the purpose of resolving captioning complaints. Funded by industry, this council would be charged with fielding initial complaints, and would be staffed with technical personnel, consumers, and governmental representatives who would act as liaisons between consumers and video providers. It would be important to ensure that the council contained equal representation by consumers and members of industry. Members of the council would be expected to contact providers upon the receipt of a complaint, and would work toward its resolution, following a criteria for good faith compliance which is established by the FCC. Where necessary, such a council would investigate the source of the complaint, if the provider is determined not to be at fault.

As a coordination point, the council would also distribute information to consumers and new video providers regarding captioning responsibilities, and serve as a clearinghouse for how

best to resolve common captioning problems²⁰ Through the receipt of information on common consumer complaints and concerns, the clearinghouse would also determine the effectiveness of FCC rules on captioning quality and make recommendations as necessary for updating quality standards. The coordination point would be accessible to consumers through toll free TTY numbers, Email, and other means. By creating a single location to lodge informal and formal complaints and concerns, a council or coordination point would alleviate the many difficulties now experienced by consumers who are dissatisfied with captioning services.

The FCC also seeks information on the elements it should require for a valid complaint. The NAD submits that one complaint on most programs - especially news and current affairs programs that are not likely to be repeated - should be sufficient to initiate a council or FCC review.

The FCC also proposes that complaints be accompanied by the best available documentation, such as viewing logs or video tapes. We agree that such documentation would assist an investigation into a complaint; however, because individuals frequently watch television without tapes that are ready to record, such logs or video tapes should be an option, not a requirement for a complainant. Rather, the name and description of the program, viewing date and time, and problem experienced should be required in the complaint.

We strongly support the FCC's proposal to verify compliance by requiring video providers to retain in a public file, or have available upon request, records on the amount of captioning they

²⁰ For example, it could have readily available information on technical solutions for ensuring that open character generated announcements do not cover captions and vice-versa. The concept of a coordination point on issues of accessibility has similarly been proposed by the (footnote cont'd on next page)

provide. Given that providers already prepare such information, this would require minimal effort, yet provide significant information for determining compliance with the Commission's captioning mandates.

XIV. Conclusion

We wish to thank the Commission for the opportunity to submit these comments, and for its commitment to ensuring access to video programming through closed captioning. We urge the FCC to take actions necessary to ensure that captioning becomes an integral part of the production process so that deaf and hard of hearing individuals can achieve full access to video programming.

Respectfully submitted,

A handwritten signature in cursive script that reads "Karen Peltz Strauss".

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Telecommunications Access Advisory Committee for implementation of Section 255 of the Communications Act, requiring access to telecommunications equipment and services.